

The anti-buy through provision prohibits cable operators from requiring subscription to any tier other than the basic tier for access to programming offered on an "a la carte" basis.<sup>114</sup> The purpose of this provision was to prevent cable operators from requiring consumers to purchase expensive tiers of service before they could have access to "premium" channels. Permitting the offering of basic service in addition to the basic tier would preserve this protection while allowing operators to better tailor services to their needs. As long as the operator offers one basic tier fulfilling the requirements under the Act, combining that tier with other services in a separate package should be an operator's marketing decision. CFA urges the Commission to read the provisions in the 1984 and 1992 Acts as complimentary.

#### **D. JURISDICTIONAL QUESTIONS**

CFA supports the Commission's interpretation in paragraph 15 of the Notice, that § 623 of the Communications Act, as amended by the 1992 Cable Act, permits certified local franchising authorities to regulate basic cable service rates in those areas which are not subject to effective competition unless the Commission disallows or revokes an authority's certification.

However, the Commission comes to the tentative conclusion that under § 623(a)(2) it has the power to regulate basic cable

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<sup>114</sup>§ 623 (b)(8)(A).

service rates only if the Commission has disallowed or revoked the franchising authority's certification. In short, if a franchising authority does not assert regulatory jurisdiction over basic cable service, the Commission believes it has no independent authority to initiate regulation of basic service rates.

While CFA understands how a literal reading of the Act led the Commission to reach this tentative conclusion, we do not believe this interpretation is consistent with Congress' intent. This conclusion disregards other key portions of the Act as well as significant parts of the legislative history. Most notably, § 623(b) makes it incumbent on the Commission to regulate basic cable service, or ensure that franchising authorities do so, where there is no effective competition. With its tentative conclusion, the Commission is simply interpreting § 623(a)(2) in a vacuum. CFA believes the Act requires the Commission to regulate all basic cable service, either on its own or through a certified authority. CFA believes that § 623(a)(2)(A) is designed to deal only with the situations where a city's certification is inadequate, not where a local authority fails to step forward to regulate.

It is the policy of Congress through the Cable Act to ensure consumer interests are protected in the receipt of cable service in all areas where cable television systems are not subject to

effective competition.<sup>115</sup> Congress also seeks to keep cable television operators from having undue market power vis-a-vis programmers and consumers.<sup>116</sup> These policy goals could not be assured if the Commission were to limit its regulatory authority to communities where certification of the local authorities has been denied or revoked. The Act's policy goals, therefore, would indicate Congress has a broader vision for Commission involvement in regulation than the one suggested in the Notice. These policy goals require the Commission to regulate cable systems where no local authority chooses to assume the responsibility for regulation.

Several parts of the Conference Report support CFA's interpretation of the Commission's regulatory role. The Conference agreement adopted much of the House Bill's language with respect to § 623 with numerous explanatory notes indicating major compromise amendments to the language. The Conference Report explains that "Section 623(b) is amended to state specifically that the Commission shall, by regulation, ensure that rates for the basic service tier are reasonable, and the goal of such regulations is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such cable system was subject to competition."(emphasis added)<sup>117</sup> Taken in

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<sup>115</sup>See Section II., supra.

<sup>116</sup>Id.

<sup>117</sup>Conference Report at 62.

context with the expressed intent<sup>118</sup> and the language of rest of the Act, it is clear that it was Congress' intent to assure that all basic rates were regulated where there is no effective competition.<sup>119</sup>

CFA's conclusion that it was Congress' intent to regulate all basic cable service, either by the Commission or through the local or state authorities, is supported by the floor debate in the House and Senate as well.<sup>120</sup> An amendment was offered to the House bill by Congressman Oxley of Ohio. The Oxley amendment sought to give the power to regulate solely to state authorities, and not the Commission or local authorities.<sup>121</sup> This approach

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<sup>118</sup>While the Conference Report provides the definitive legislative history for the Cable Act, it is often instructive to look to the House and Senate Reports to garner Congress' intent when language is taken from one or the other and included in the Conference Report. The Senate's intent regarding the extent of Commission authority is clear. In the Senate Report's Summary of Major Provisions, the Senate states, "A franchising authority (city, county or State) can obtain jurisdiction over basic rate regulation by certifying to the FCC that it will follow the FCC's procedures and standards. Otherwise, rate regulation authority remains with the FCC. Senate Report at 63.

<sup>119</sup>This is further supported by the language in the Senate bill. The Senate bill language is relevant in so far as the Conference Report represents a compromise between the two chambers. The Senate bill states, "Section 5 ... amends Section 623 of the Communications Act to give the FCC, and in some cases, local authorities, the power to regulate the rates for certain cable services and equipment." Senate Report at 58.

<sup>120</sup>The House floor debate is of great significance, since the language used in the Senate version of the bill was not ambiguous. The ambiguous language at issue was taken from the House version which was subsequently included in the Conference Report.

<sup>121</sup>Representative Fields of Texas asked what the effect of the Oxley Amendment would be on states that did have cable commissions in place. Representative Oxley responded that those states "would be in a position to create their own regulatory schemes. That would be the job, obviously, of the people of Texas to make that

would have left it to the discretion of the state regulatory bodies whether to regulate at all.

Several statements made during the floor debate on the amendment, including those made by the chief authors of the legislation, House Telecommunications Subcommittee Chairman Markey and House Energy and Commerce Committee Chairman Dingell, contradict the Commission's tentative conclusion regarding its limited powers of regulation. These statements indicate Congressional intent to regulate all basic service where there is no effective competition, either directly or by certifying a local authority to do so.

Subcommittee Chairman Markey stated that the "amendment strikes at the heart of the legislation which we have before us today because the Oxley Amendment allows States not to regulate at all, and in States that do not adopt cable regulations consumers would be entirely unprotected, and that would frustrate Congress' ability in an effort to establish universal protections for all Americans."<sup>122</sup> Committee Chairman Dingell stated, "...the protection which would be afforded with regard to basic cable rates is excised by the amendment offered by my dear friend

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determination." 138 Cong. Rec. H6521 (daily ed. July 23, 1992)(statement of Rep. Oxley).

<sup>122</sup>Id., (statement of Rep. Markey).

from Ohio (Rep. Oxley)."<sup>123</sup>

Congress' intent that the Commission be responsible for regulating basic cable services if no local authority steps forward is also apparent from the Senate floor debate on the Conference Report. Senator Lieberman of Connecticut stated that the Cable Act would come to the aid of consumers. He said, "If the cable company has no effective competition, the FCC would be required to ensure that the charges for both the limited basic tier and, if a complaint is made, the deluxe basic tier are reasonable."<sup>124</sup>

Part of the confusion in discerning Congress' intent with respect to this provision results from the fact that some "franchising authorities" are local entities (i.e. cities) and

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<sup>123</sup>Id. at 6522 (statement of Rep. Dingell). Representative Dingell went on to say, "[This amendment] is essentially a Potemkin Village which is offered to us, all facade and nothing behind. ... what [Rep. Oxley] does is offer an amendment which does not really afford any requirement that there be any regulations to protect the viewers of cable television. A Potemkin Village? Perhaps worse. A sham? Probably worse. In point of fact, what this really is is essentially something which is done to skin the consumers of this country and to permit bad actors to continue to do so. What we need here are real protections against serious misbehavior about which the consumers complain. In point of fact, if this amendment passes, the consumers of this country are in fact being skinned." (statement of Rep. Dingell). See also; Id. at H6522; "Perhaps under the Oxley Amendment, the State of Florida would act in [consumers'] interest and with enough speed to resolve their concerns before the time for franchise renewal expired. But perhaps not. I do not want to run that risk." (statement of Rep. Bilirakis);

<sup>124</sup>138 Cong. Rec. S14,583 (daily ed. September 22, 1992)(statement of Sen. Lieberman)(emphasis added).

others are statewide regulatory agencies. A franchising authority may have either statewide or local jurisdiction. It is conceivable that a situation could arise wherein a local franchising authority desires to regulate basic cable service, but there is a state law forbidding it to do so.

In that situation, consumers would not be protected from undue market power unless the Commission steps in to regulate, or authorizes the local community to regulate notwithstanding the state law. This scenario presents neither a case of revocation or denial of certification by the Commission. Under the tentative interpretation offered by the Commission, the citizens of these communities would be left with no protection from continued rate gouging and unreasonable rates and services. This was clearly not the intent of Congress.

The provision of the 1992 Cable Act at § 623(b) mandates that the Commission shall ensure reasonable rates. The language indicates that this portion of the Cable Act is preemptive in nature. Recognizing that there are several means of preemption available to the Commission, in fashioning this provision Congress may have been trying to design a less intrusive means. The Commission could preempt a state ban on rate regulation by local franchising authorities by ordering the local authority to disregard the state law and regulate rates. In the alternative, the Commission could preempt the state ban on rate regulation by

simply regulating basic cable service itself. The first scenario is significantly more intrusive than the second, and it appears that Congress preferred the less intrusive means of regulation.

The language found at paragraph (6) of § 623(a) would seem, therefore, to simply be an example of peculiar drafting. Congress used an unfortunate choice of terms given the clear Congressional intent that Commission regulation apply to all cable systems that are without effective competition, and given the conclusive evidence of Congress' true intent found both in the Act itself and throughout the legislative history.

CFA therefore believes that in light of the Cable Act and its legislative history, the Commission has the legal obligation to make certain that basic cable service is regulated where no effective competition exists. The Commission may meet this obligation by regulating basic cable service rates itself. If there is a local franchising authority that is both capable and desirous of implementing basic cable service regulations, the Commission would be free to delegate its authority to the local franchising authority for that purpose.

Once the Commission recognizes the extent of its authority to regulate basic cable service, the issue turns to how it exercises that authority in a manner that carries out the intent of Congress. The Commission should recognize and declare its

authority to regulate basic cable service in those area's where local authorities cannot or will not regulate. It may then decline to exercise that authority until it becomes more clear how many communities would require Commission intervention.<sup>125</sup>

The Commission should also accept franchise authority inquiries which indicate a desire on the part of the local franchising authority to regulate, but where there exists a legal impediment or a lack of resources to do so properly. In those communities, the Commission could then step in and regulate basic cable service.

#### **E. REGULATION OF EQUIPMENT**

##### **1. EQUIPMENT USED FOR BASIC AND OTHER TIERS**

At paragraph 65 of the Notice, the Commission requests comment on whether Congress intended to limit cost based regulation to equipment used only to receive the basic tier of service. CFA believes that the legislative history is clear on this point. The changes made in the Conference Report demonstrate the clear intent of Congress to apply cost based regulation to all equipment used to receive the basic tier of service, regardless of whether it is also used to receive other

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<sup>125</sup>Depending upon the response by local authorities in the certification process, the point may ultimately be moot.

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The 1992 Cable Act requires the Commission to include standards to establish cost based regulations with respect to "installation and lease of the equipment used by subscribers to receive the basic service tier..."<sup>126</sup> The Commission recognizes in footnote 93 of the Notice, that this language represents a rejection of the House bill's approach in favor the Senate bill's language.<sup>127</sup> The change reflects Congress' intent to give the Commission "greater authority to protect the interests of the consumer."<sup>128</sup>

The change made from the language in the House bill was intended to broaden the power of the Commission to regulate equipment. By eliminating the restriction in the original House bill that cost based regulation can only be applied to equipment "necessary" to receive the basic tier, Congress seeks to mandate cost based regulation for most equipment used to receive cable service.<sup>129</sup> Congress recognizes that there is likely to be significant overlap in equipment used to obtain basic service and other services.

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<sup>126</sup>§ 623(b)(3).

<sup>127</sup>Conference Report at 64. "'The equipment necessary by subscribers to receive the basic service tier' is replaced with 'equipment used by subscribers'."

<sup>128</sup>Id.

<sup>129</sup>Congress did not intend to include equipment necessary only to receive pay per view or premium "a la carte" services. This would be in line with Congress' intent not to regulate the rates charged subscribers for the aforementioned services.

CFA believes it is in the public interest and follows Congress' intent to apply cost based regulations to any equipment that is actually used to receive the basic tier. This would include equipment that can be used to receive other cable services as well. It would not serve Congress' intent of eliminating rate gouging and emulating competitive market pricing if cable operators are permitted to make unrestricted monopoly profits from their equipment leases and installation charges. CFA urges the Commission to interpret § 623(b)(3) broadly, as Congress clearly intended.

## **2. EQUIPMENT COST ALLOCATION**

At paragraph 66 of the Notice, the Commission seeks comment on what costs are to be included in cost-based regulation of equipment. Given Congress' intent to promote a competitive cable equipment market (like customer service equipment for telephone service), it makes no sense to allocate joint and common costs to equipment. CFA's proposed global formulaic regulatory model separates equipment costs from base-year rates (where applicable) for stand-alone treatment. We urge the Commission to follow this approach.

## **3. PROMOTIONAL EQUIPMENT PRICING**

The Commission solicits comment at paragraph 70 of the

Notice on whether Congress intended to prohibit cable operators from offering installation or other equipment at less than cost as a promotional tool. The question stems from Congress' mandate that the Commission's "regulations shall include standards to establish, on the basis of actual cost, the price or rate" for installation and equipment.<sup>130</sup> The Conference Report indicates Congress' intent for the Commission to grant cable operators flexibility in marketing decisions.<sup>131</sup> Therefore, CFA believes that such promotional practices are not *per se* illegal under the Act, provided these practices are offered in a way which does not compromise the pro-competition and consumer protection purposes of the Act.

Neither the Act nor its legislative history specify whether equipment and installation should be bundled in a single package, several packages or sold individually. It is likely to vary among systems. The cost based approach to regulating installation and equipment helps to that assure prices for installation and equipment are reasonable in that they emulate a competitive market. It is also a way for the Commission to set a ceiling for these items regardless of whether they are offered individually or as a package. Permitting cable operators to offer installation and equipment as one or more packages or

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<sup>130</sup> § 623(b)(3).

<sup>131</sup>Conference Report at 63. "Rather than requiring the Commission to adopt a formula to establish the price for equipment, the Commission is given the authority to choose the best method for accomplishing the goals of this legislation."

individually gives greater flexibility both to consumers and operators without compromising Congress' intent.

The inquiry must then turn to whether permitting cable operators to offer installation or equipment at less than actual cost would compromise legislative intent or do harm to consumers. It is quite conceivable that a cable operator would choose to use installation and/or equipment as a loss leader to attract more subscribers to its system. This marketing decision, as long as the "loss" is not recovered through unreasonable charges for other equipment and services, would not seem to violate Congress' intent. CFA believes however, that the Commission must make certain that the overall cost of installation and equipment remains reasonable (i.e. cost based) to comply with Congress' intent.<sup>132</sup>

The obvious danger in permitting cable operators to use installation or equipment as a loss leader comes from how the operators choose to absorb the loss. If cable operators decide from a marketing standpoint that they will absorb the loss from the reasonable profits they are permitted under the Act<sup>133</sup>, there is no inherent problem with using this loss-leader approach. If however, they choose to make up the loss by charging more for other equipment and installation services or

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<sup>132</sup>Id.

<sup>133</sup>§ 623(b)(2)(vii).

improper bundling of equipment charges to recover the "loss" taken, then there are serious concerns that the intent of Congress would be compromised.

CFA believes the Commission should make a tentative finding that below-cost equipment pricing is not prohibited per se by the Act. The Commission must monitor promotional pricing on an ongoing basis. If promotional pricing begins to interfere with the development of competition in the equipment and installation markets, the Commission would have to re-evaluate the issue. It is the policy of the 1992 Cable Act to rely on the marketplace as much as possible.<sup>134</sup> The Commission must balance this goal with its obligation to ensure that consumer interests are protected where there is no effective competition to cable.<sup>135</sup> CFA believes these goals can best be accomplished if the Commission's regulations permit promotional pricing so long as such practices do not involve unreasonable cost shifting.

#### **F. DEFINING CABLE PROGRAMMING SERVICE**

##### **1. REGULATION OF MULTIPLEXING**

CFA agrees with the Commission's tentative conclusion at a paragraph 95 that pay-per-channel or per-program material should

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<sup>134</sup>§ 2(b)(2).

<sup>135</sup>§ 2(b)(4).

be excluded from the definition of "cable programming service" when offered on a multiplexing or time-shifted basis.<sup>136</sup> If however, a multiplexed premium service is packaged together with any other service, it would be the equivalent of a tier and not subject to the exemption found at § 623(1)(2) of the Act.<sup>137</sup> CFA believes to effectuate Congress' intent, the Commission must find that if the programming offered on multiplexed premium services is different in any way other than the time it is offered, it is different programming and must be subject to regulation as a separate tier.

## 2. REGULATION OF PREMIUM TIERS

At paragraph 96 of the Notice, the Commission solicits comment on whether a tier composed of "premium" or "a la carte" channels would be subject to rate regulation. CFA believes the Act is clear on this point: all tiers of service are subject to regulation. Therefore, even a tier composed of channels traditionally offered on an "a la carte" basis would be subject to rate regulation if bundled together and offered in a tier.

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<sup>136</sup>While the Conference Report does not directly address this issue, the language was taken from the House Bill. The House Report states, "The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option." House Report at 80.

<sup>137</sup>Id.

The Commission is obligated to determine if the rates charged for "cable programming service"<sup>138</sup> are "unreasonable" when a complaint meeting the minimum showing required by the Commission is filed by an appropriate party.<sup>139</sup> The only programming services that are excluded from this inquiry are programming carried on the basic tier and programming offered on a per-channel or per-program basis.<sup>140</sup>

CFA agrees with the Commission's premise that premium services are not to be regulated when offered on an "a la carte" basis. However, if premium services are combined into a tier, even at the same price as if a subscriber purchased each channel separately, these services would no longer fall inside the limited exemptions from regulation provided for at § 623(1)(2) in the Act.

It is likely that Congress chose not to regulate premium services because when offered on an "a la carte" basis, these channels may face some competitive pressure from VCR's and movie theaters. However, the benefits of competitive forces may be eliminated when the programs are offered bundled together as a

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<sup>138</sup>Cable programming service is defined as "any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis." § 623(1)(2).

<sup>139</sup>§ 623(c)(1).

<sup>140</sup>§ 623(1)(2).

tier. Congress has recognized that bundling of cable services involves the use of monopoly power in the cable market and often leads to abuse of consumers.<sup>141</sup> CFA believes any bundling of services must therefore be closely scrutinized by the Commission.

Under the Act, a tier made up of premium channels, whatever the price, would be subject to rate regulation under the same terms and conditions as other "cable programming services" as defined by the Act.<sup>142</sup> Therefore, CFA urges the Commission to define any package of premium channels offered to subscribers for a single price as a tier for purposes of rate regulation under the Act.

#### G. THE COMPLAINT PROCESS

The Commission seeks comment at paragraphs 97 through 110 on the mechanics of the complaint procedures necessary to trigger an inquiry by the Commission into the reasonableness of cable programming service rates. Specifically, the Commission requests comments on what constitutes fair and expeditious procedures for filing and reviewing complaints, determining rate reductions and implementing refunds. CFA urges the Commission to create simple, minimal requirements for subscribers to initiate and participate

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<sup>141</sup>To prevent this behavior by cable operators, Congress included the "anti-buy through" provisions in the Act. § 623(b)(8).

<sup>142</sup>§ 623(1)(2).

in these proceedings, as Congress intended.<sup>143</sup>

The Commission suggests two alternatives with respect to the requirements regarding what information a valid complaint must contain. CFA believes the requirements described in paragraph 99 of the Notice do not accurately reflect Congress' intent and put too great a burden on subscribers. Asking the average subscriber to explain how and why a service change by their cable operator violates the Commission's rate regulations does not reflect Congress' intent to make this procedure as simple and effective as possible, while protecting the due process rights of the cable operator. In essence, it would force subscribers to make out a "prima facie case" which Congress clearly rejected.<sup>144</sup>

The requirements set out in paragraph 100 and 101 of the Notice are more in line with Congress' intent. The Act contemplates only that subscribers would be required to "allege" that the rates "could" be unreasonable. This is consistent with the "minimum showing" contemplated by Congress.<sup>145</sup> CFA endorses the second alternative set forth by the Commission to establish a minimum showing in a complaint.

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<sup>143</sup>"The intention of the conferees is to allow consumers to simplify the process of filing complaints concerning unreasonable rates. For instance, it is not the intention of the conferees that the FCC's regulations be so technical or complicated as to requires subscribers to retain the services of a lawyer to file a complaint..." Conference Report at 64.

<sup>144</sup>Id.; "The requirement that a complaint must demonstrate a 'prima facie case' is not included."

<sup>145</sup>Id.

CFA advocates the Commission creating a standardized complaint form which asks for 1)complainants name; 2)the complainants address for service of documents; 3)complainants status as a current or former subscriber; 4)the cable operator's name; 5)a brief description of the basis for the complaint and the nature of the service change (i.e. re-tiering, rate increase or other service changes); 6) the proposed effective date of the service change.

Upon receipt of this form or the same information in another form, (i.e., possibly a copy of a recent cable bill, annotated) the Commission could then apply the formula used to determine if rates are reasonable and decide if the complaint meets the minimum showing. If it does, or if the Commission needs more information to apply its formula, the Commission would then contact the local cable operator (and inform all other interested parties i.e. the complainant, franchise authority, local municipality etc.) for further information and a formal response to the complaint. This would shift the burden to the cable operator to demonstrate that the rate or service change is reasonable under the regulations established by the Commission pursuant to the 1992 Act.<sup>146</sup>

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<sup>146</sup>It is reasonable to shift the burden of proof to the cable operator with a very minimal showing by the subscriber. The operator controls the information necessary for the Commission's review of reasonableness.

If the local cable operator fails to respond to the information request, the Commission should institute fines against the cable operator. After a reasonable time, if the cable operator continues its failure to respond to the inquiry, the Commission should find in favor of the complainant and determine the reasonable rate for the cable service at issue based on the information they have in their possession. The Commission should also institute forfeiture proceedings against cable operators who fail to respond to complaints and inquiries within a reasonable period of time.

The Commission suggests that involving the franchising authority in the complaint process could help make the complaint process more effective in paragraph 102 of the Notice, and seeks comment on whether and to what extent subscribers must get a franchising authorities concurrence before they could file a complaint with the Commission. These suggestions are completely at odds with Congress' intent and with simple logic.

The Act clearly contemplates subscribers and franchising authorities being on equal ground with respect to the complaint process. Congress requires the Commission to establish "fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any subscriber, franchising authority, or other relevant State or local government

entity..."<sup>147</sup> Furthermore, the Conference Report specifically rejected the language from the House Bill which would have restricted the complaint proceedings to "local franchising authorities and relevant government entities."<sup>148</sup> Instead, the Conference Report expressly sought to permit subscribers to file and pursue complaints with the Commission.<sup>149</sup> The Commission's proposal to require complaining subscribers to first get concurrence from the local franchising authority to file its complaint would subvert Congress' clear intent, by placing an unnecessary hurdle in the path of subscribers and unduly prolonging the complaint review process.

The Commission proposes to make subscribers responsible for providing proper notice to cable operators and franchising authorities of complaint filings at paragraph 102 of the Notice. CFA believes such a requirement subverts Congress' intent by putting unnecessary burdens on the complaining subscriber and the local operator.

It is reasonable to expect there will be a number of valid complaints against the same cable system after a service change is announced. CFA believes it would be much more efficient if the Commission made an initial review of the complaints to assure that they meet the minimum required standards. After this is

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<sup>147</sup>§ 623(c)(1)(C).

<sup>148</sup>House Report at 87.

<sup>149</sup>§ 623(c)(1)(C).

done, the Commission should then be responsible for notifying the cable operator of the complaints and their contents. This will prevent operators from responding to frivolous complaints or making separate responses to separate complaints which make identical claims. Subsequent filings would be served on all parties to the proceeding, including the franchise authority.

The above approach recommended by CFA supports the proposal set forth by the Commission in paragraph 104 of the Notice. CFA urges the Commission to require operators to respond to all complaints that made the minimum showing necessary under the Commission's regulations.<sup>150</sup>

The Commission tentatively concludes that 30 days from the time a subscriber receives notification of a service change is a reasonable amount of time in which to accept complaints in paragraph 105 of the Notice. CFA strongly disagrees and believes this is an unreasonably short time period in which subscribers or franchising authorities can be expected to file a complaint.

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<sup>150</sup>This would include complaints initiated by the Commission itself. CFA does not support the Commission's suggestion that operators would only be required to respond to complaints that identify rates outside the benchmark. CFA believes Congress intends to provide reciprocal rights to subscribers and operators. Operators have the ability to show their rates, although above the level set by the Commission, are still reasonable. In the interest of fairness, subscribers should have an equal opportunity to prove that rates, although under the level set by the Commission, are unreasonable.

It is likely that many subscribers will not examine their bills and take note of a service or rate change until they write their monthly check to the cable operator. That could be several weeks after receipt of the bill. Under the Commission's tentative conclusion, this could leave the subscriber no more than a few days in which to investigate where and how to file a complaint, do the necessary paperwork and file the complaint. This is simply unreasonable for even the most diligent consumer.

The Commission has discretion in deciding what constitutes a "reasonable" time frame in which to file complaints.<sup>151</sup> CFA believes that to avoid frustrating Congress' intent of providing a mechanism by which ordinary subscribers, behaving as ordinary consumers, can protect themselves from unreasonable rates and improper practices by their local cable operator, the Commission should follow Congress' lead in defining a reasonable time period. CFA urges the Commission to permit subscribers at least 90 days in which to file a complaint after a service change.<sup>152</sup> Since the Commission would not be authorized to order refunds issued for any time prior to the date a complaint is filed, this somewhat broader window would not disadvantage cable operators.

At paragraph 107 of the Notice, the Commission solicits

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<sup>151</sup>§ 623(c)(3).

<sup>152</sup>Congress found 180 days to be a reasonable time period for filing initial complaints after implementation of the new regulations. There is no reason to find half that time period unreasonable for any subsequent service changes.

comment on whether it has the authority to prescribe specific rates when ordering prospective rate reductions. CFA believes the Commission may, in an attempt to carry out its obligation to ensure reasonable rates, prescribe specific rates. The Commission is given express authority to "prescribe procedures to be used to reduce rates for cable programming services that are determined...to be unreasonable..."<sup>153</sup> Since rates cannot be reduced in the abstract, but must be reduced to a specific level, the Commission can prescribe specific rates that are not unreasonable for cable programming services.<sup>154</sup>

The Commission solicits comment, at paragraph 108, on the scope of its refund authority under the Act. The primary statutory constraint on the Commission's refund authority is that it cannot order the refund of amounts paid prior to the date of filing of a complaint.<sup>155</sup> Refund authority clearly extends to overages from the time of filing of the complaint until the rates are found to be unreasonable and are reduced.

CFA concurs with the tentative conclusions of the Commission at paragraph 108 with respect to the manner in which it may order refunds. CFA believes it would be best to refund overages to those subscribers that actually paid them. However, in cases

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<sup>153</sup>§ 623(c)(1).

<sup>154</sup>If the Commission did not have this power, their statutory refund authority would be null.

<sup>155</sup>§ 623(c)(1)(C).

where the burden would be too great or the amount to be refunded was extremely small, the Commission could justify a prospective rate reduction to an entire class of subscribers instead.<sup>156</sup>

CFA also agrees with the Commission's conclusion that it can order refunds to an entire class based on the complaint of a single subscriber.

At paragraph 110 of the Notice, the Commission tentatively concludes that cable operators that fail to comply with the relief ordered by the Commission are subject to forfeiture under 47 U.S.C. § 503(b). CFA supports the Commission's tentative conclusion. There is no evidence in the Act or its legislative history that Congress intended to exempt cable systems from the forfeiture powers available to the Commission. Furthermore, CFA supports the Commission's intent to require operators to certify their compliance with the Commission's orders under this section of the Act. This will reduce the burdens on all parties of monitoring operator compliance.

To enable subscribers to participate effectively in the complaint process and effectuate Congress' intent, the Commission must promulgate rules which include reasonable notice provisions designed to inform subscriber of the extent of their rights and the information necessary to file a complaint. CFA proposes

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<sup>156</sup> CFA believes this method should be used only when absolutely necessary.